HEW KIANG HOE & ANOR A

v.

SHENCOURT PROPERTIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[COMPANIES (WINDING-UP) PETITION NO: D4-28-44-2002]
23 MAY 2011

COMPANIES AND CORPORATIONS: *Winding-up - Liquidator - Liquidator tardy and incompetent - Allegation of - Application to remove liquidator - Factors to be considered - Fair play to liquidator - Companies Act 1965, s. 232(1)* C

Upon the petitioners' application, the respondent was wound up by order of court and in due course a private liquidator was appointed. After seven years of the liquidator having taken office and exasperated by his slow progress in realizing the assets of the respondent, the petitioners applied to court for his removal under s. 232(1) of the Companies Act 1965. They suggested the name of another liquidator to be appointed in his place. The petitioners cited a litany of complaints against the liquidator, among which were his failures to: (i) file an account of receipt and payments and statement of the position of the winding-up every six months (ii) make out, verify and file a statement of affairs of the respondent; (iii) compel the respondent's directors to provide a proper statement of affairs; (iv) notify creditors to prove their debts and examine proofs of debt already lodged; (v) investigate the suspected irregular fund transfer out of the respondent; (vi) call for meetings of the creditors and/or contributories; (vii) take into his custody or control all assets and things in action to which the respondent was entitled to; and (viii) do all such things as were necessary for the speedy winding up of the respondent and the distribution of its assets. D E F G

The liquidator's main defence to the charges was that he was hampered by lack of funds to carry out the things he was accused of not doing. He said he had obtained a court order to have properties under 18 titles that were wrongly transferred from the respondent to certain parties to be transferred back to the H I

respondent so that they may be liquidated for cash but his hopes were frustrated by a stay granted against that order pending appeal to the Court of Appeal.

Held (ordering the liquidator to personally pay RM8,000 costs to the petitioners and appointing an additional liquidator for the respondent):

(1) Justice of this case was best served by appointing an additional liquidator to act together with the current liquidator. The appointment was subject to a single liquidator's fees and to directions the court would give under s. 232(7) of the Companies Act 1965. (paras 51, 54 & 55)

(2) To remove the liquidator at the stage when he was beginning to realize the fruits of his sweat and toil would be going against the grain of decided cases where fair play to the liquidator was a matter to be considered in deciding whether he should be removed from office. (para 50)

(3) Fair play to the liquidator involved taking into consideration his efforts to obtain the court order to transfer the 18 titles back to the respondent and that hitherto all applications made were at no immediate costs to the respondent. There was also no danger of the respondent's assets being imperilled if the liquidator continued to be in office. (paras 47 & 48)

(4) The fact that the liquidator had not applied to court for indemnity from the creditors and contributories to foot the bill for further legal action, be it examination of the respondent's directors or some forensic investigation into the irregular payments out from the respondent, may be a misjudgment or even a mistake on the liquidator's part but that alone was insufficient to justify his removal. It was not such a mistake as to have seriously prejudiced the liquidation. (para 49)

(5) Delay in filing the relevant accounts in Form 75 and the statement of affairs as well as compliance with other statutory time frames were matters which were not in the class of a blatant violation that had prejudiced or paralysed the respondent to the extent of impairment of its assets. (para 50)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 10 CLJ 7 HC ***(refd)***

Adam Eyton Ltd [1887] 36 Ch D 299 ***(refd)***

Chua Boon Chin v. JM MCCormack & Ors [1978] 1 LNS 33 HC ***(refd)***

In Re George A Bond and Company Ltd [1932] SR (NSW) 301 ***(refd)***

Intercontinental Properties Pty Ltd [1977] 2 AC LR 488 ***(refd)***

Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners) [2006] 3 CLJ 360 HC ***(refd)***

Oriental Finance Bhd v. Syarikat Seri Paroi Sdn Bhd [2003] 7 CLJ 414 HC ***(refd)***

Procam (Pte) Ltd v. Charles Jocelyn Tichborne Nangle & Anor [1990] 4 MTC 208 HC ***(refd)***

Re George A Bond & Co Ltd [1932] 32 SR (NSW) 301 ***(refd)***

Re Sir John Moore Gold Mining Co [1879] Ch D 331 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 176(1), 232(1), (7), 234, 236(1), (3), 237(2), (3), 247, 249, 250, 252(e), 281(1), 300

Companies Act 1962 [UK], s. 141

Other source(s) referred to:

McPherson, *The Law of Company Liquidation*, 4th edn, LBC Information Services 1999, p 365

For the petitioners/applicants - David Mathews (Regina Ho with him); M/s Mathews Hun Lachimanan

For the contributory (Shencourt Sdn Bhd) - Victoria Martin; M/s Victoria Martin

For the judgment creditors (Loo Foong Meng, Loo Foong Leng, Loo Foo Peng & Ng Hui Khim) - HH Tay; M/s Tay & Helen Wong

For the judgment creditor (Lim Choan Hok) - Masitah Alias; M/s Hazidin Chan

For the liquidator - Eugene Jeyaraj; M/s Rueben Williams

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] A lot is expected of a professional and it does not help at all if there is no open channel of communication between the professional and the people he serves. Here the liquidator

A concerned found his actions and more particularly his perceived inaction as justifying his removal at the instance of some creditors. He resisted his removal not least because his professional image and integrity is at stake. He said he could have done more but for the lack of funds.

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[2] However the petitioners/applicants accused him of riding on his high horse; aloof and above the clamour of creditors crying out for progress on the liquidation exercise. They accused him of not contacting them and not convening a meeting to confer with C them on the progress of the liquidation. It goes without saying that open communication builds relationship, develops understanding and engenders trust.

Parties

D **[3]** The petitioners had petitioned for the respondent to be wound up for inability to pay its debt to the petitioners. The debt was a consent judgment recorded on 19 August 1999 which remained unpaid to the tune of RM54,600. The respondent was wound up on 19 April 2002 by the court and the official receiver E (OR) was appointed as provisional liquidator.

[4] The petitioners lodged their Proof of Debt ('POD') with the OR on 27 January 2003. The Liquidator Ricky Thong Yew Fook (the liquidator) was appointed in replacement of the OR on F 4 February 2004. The liquidator prepared a preliminary report on 24 September 2007 identifying *inter alia*, the respondent's assets as well as irregular fund transfers.

Problem

G **[5]** There was no income coming into the respondent and the liquidator was hampered as such in most of the things that he wanted to do. He did what he thought was of crucial importance: the recovery of properties purportedly transferred from the respondent to Liberty Pillar Sdn Bhd ('Liberty Pillar') and the Chai H family and managed to obtain an order from the court on 29 September 2009 for the properties (represented in 18 titles) to be transferred back to the respondent.

[6] There was however a stay granted against this order of the I court pending Liberty Pillar's appeal to the Court of Appeal.

[7] Exasperated by the slow progress of the liquidator in realising the assets of the respondent and the silent rebuff they received from the liquidator each time the petitioners requested for information and documents relating to the liquidation, the petitioners have applied for the liquidator's removal.

Prayer

[8] The petitioners applied for the following orders and reliefs in encl. 109:

(a) That Ricky Thong Yew Fook of Messrs Thong & Associates, the Liquidator of Shencourt Properties (In Liquidation) Sdn Bhd, the named respondent company be forthwith removed as Liquidator of the respondent company on such terms and upon such directions deemed fit and appropriate pursuant to s. 232(1) of the Companies Act 1965 and/or under the inherent jurisdiction of this Honourable Court;

(b) That Anthony Joseph Skelchy of PKF Covenant Sdn Bhd (Liquidator's Licence No. 251/03/11 (JPH) be appointed as Liquidator of Shencourt Properties (In Liquidation) Sdn Bhd in place of the said Ricky Thong Yew Fook;

(c) Suitable provision be made for the cost of and incidental to this application to be paid out of the assets of the respondent company; and

(d) Such further or other relief deemed fit and appropriate by this Honourable Court.

[9] The brief grounds of this application are that:

(a) The liquidator has failed to faithfully discharge his statutory duties as a liquidator and has failed to display a reasonable amount of skill and diligence in conducting the affairs of the company;

(b) The liquidator has blatantly disregarded statutory obligations such as the requirements for lodging six monthly statements of payments and receipts and of position in the winding up, to adjudicate upon proofs of debt lodged, of settling the lists of contributories and creditors etc.;

A (c) The liquidator has failed to take reasonable steps get in and take possession of the assets of the respondent and has neglected to pursue any form of action against the directors and others connected with the respondent to locate and recover the assets of the respondents and has generally been
B apathetic and/or indifferent;

(d) The liquidator had failed to call any meetings to ascertain the wishes of the creditors and contributories;

C (e) The liquidator has displayed a lack of probity in his dealings and has failed to keep the creditors updated on the progress of the liquidation;

(f) The liquidator has no interest in speedily concluding the winding up;

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(g) It would not be in the interests of all parties concerned in the liquidation for the current liquidator to remain in office any longer;

E (h) The liquidator has been tardy in conducting the affairs of the respondent's liquidation and has abdicated his duties, and

(i) The liquidator has prejudiced the interest of the respondent and the creditors.

F **Principle**

[10] There is no doubt that a liquidator, as an officer of the court, is at all times expected to act honestly, with due care and with such a degree of diligence and promptitude as will ensure that the winding up will be completed within a reasonable time.

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[11] The petitioners have made the application under s. 232(1) of the Companies Act 1965 where 'on cause shown' the liquidator may be removed by the court. The petitioners have a litany of complaints against the liquidator as follows:

H

(a) The liquidator's failure to prepare and file the liquidator's account of receipt and payments and statement of the position in the winding-up in form 75;

I (b) The liquidator's failure to take into his custody or under his control all the properties and things in action to which the respondent is or appears to be entitled;

(c) The liquidator's failure to make out, verify and file a statement of affairs of the respondent to the OR; A

(d) The liquidator's failure to further investigate and/or gather further information from the directors of the respondent upon discovery of gross inaccuracy of the statement of affairs prepared; B

(e) The liquidator's failure to issue notice to creditors to prove their debts;

(f) The liquidator's failure to examine proof of debt lodged with him; C

(g) The liquidator's failure to call for meetings of the creditors and/or contributories for the purpose of determining whether or not the creditors or the contributories require the appointment of a committee of inspection; D

(h) The liquidator's failure to investigate the suspected irregular fund transferred out of the respondent; and

(i) The liquidator's overall failures to do such other things as are necessary for winding-up the affairs of the respondent and distributing its assets. E

[12] In elaboration of each of the above failures, the petitioners' counsel, Mr David Mathews, referred to the statutory provisions that had been breached by the Liquidator. F

Failure 1: Failure To File Liquidator's Account

[13] The petitioners' counsel submitted that the liquidator had failed to discharge his duties under s. 281(1) of the Companies Act 1965 to file a periodical account with the Registrar of Companies (ROC) and the OR every six months from the date of his appointment until he ceases to act as liquidator. According to the petitioners the liquidator had been appointed since 4 February 2004 and so he should have filed no fewer than 14 Form 75's since his appointment. To date, none has been filed. G H

[14] The liquidator through his counsel, Mr Eugene Raj, contended that the liquidator here faces an unenviable position; the statement of affairs submitted by the directors of the I

A respondent was suspect. The liquidator has reasons to doubt the accuracy of the statement of affairs and upon his closer examination, the statement was grossly inaccurate and as such he was statutorily unable to declare on the veracity of the identification of both the assets and liabilities of the respondent.

B

[15] The liquidator was hampered by the lack of funds to proceed further and so did not take any further action in the meanwhile.

C **[16]** I find that the liquidator is not totally without a mitigating excuse in not filing the liquidator's account though that would certainly expose him to a charge and a penalty. As he needs to verify by statutory declaration an account of his receipt and payments and a statement of the position in the winding up, he was fearful that to verify a wrong position of the respondent's D assets and liabilities would be a greater wrong. At any rate there has been no movement of funds within the respondent.

Failure 2: Failure To Make Out, Verify And File A Statement Of Affairs Of The Respondent To The OR

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[17] The petitioners submitted that the liquidator had failed to take the necessary steps to compel the respondent's directors to provide a proper statement of affairs despite the wide powers conferred by the Companies Act on the Liquidator. His powers F are found in ss. 234, 249, 250, 300 of the Companies Act.

[18] The liquidator's explanation is that all these applications to court to compel the attendance of the directors involve money which he would have to advance to engage the services of G solicitors to apply to, attend and argue before the court. He said that whatever resources he had had been channelled towards applying to court for the transfer back to the respondent all the 18 titles wrongfully transferred out which he managed to obtain an order of the court to that effect but alas, a stay of the order H was granted. The matter is now pending the hearing of the appeal on 18 May 2011.

[19] I find that though the liquidator has not fully exhausted the various avenues opened to him to investigate further and to compel the directors to attend court and be examined on the I accounts, yet the lack of funds do present a constant and continuing challenge.

Failure 3: Failure To Issue Notice To Creditors To Prove Their Debts And To Examine Proof Of Debt Lodged

[20] The petitioners contended that the liquidator has a legal duty to ascertain the extent of debts and liabilities of the respondent. The relevant provisions are s. 247 and 252(e) of the Companies Act. Here the petitioners had filed their proofs of debt on 27 January 2003 and despite the Liquidator having taken office for seven years, the petitioners have not heard from him on the status of their proofs.

[21] The liquidator's brief explanation is that all the proofs of debt handed over to him by the OR have not been accepted or rejected by the OR. The liquidator said that he would deal with them only when there are funds in the respondent which in turn is entirely dependent on the outcome of the appeals in the Court of Appeal in respect of the land titles transferred out of the respondent. The liquidator's stand is that the POD filed by the petitioners showed a sum of RM58,617.04 pursuant to a consent judgment or 0.26% of the total POD filed of RM20,591,516.95 (as it stood then without including fees and the costs of litigation).

[22] I find that there is obviously some tardiness here though no serious prejudice has been suffered by the petitioners or other creditors as if the debts are judgment debts, there is hardly any ground for rejecting it. In any event no payments out can be made in the absence of funds coming in which would only come in if the Court of Appeal affirms the decision of the High Court on the 18 titles and the properties in questioned be sold for cash to be realised.

Failure 4: Failure To Investigate The Suspected Irregular Fund Transferred Out Of The Respondent And The Other Affairs Of The Respondent

[23] The petitioners pointed out that in the liquidator's preliminary report dated 24 September 2007, the liquidator had reported his findings of irregular fund transfers from the respondent to a company known as Shencourt Sdn Bhd. He had concluded the report by indicating that he will conduct further investigation before invoking s. 250 of the Companies Act against the officers of the respondent.

[24] The petitioners complained that the liquidator has not pursued the investigation as indicated and his main excuse is that there are insufficient funds available for him to proceed further.

[25] The petitioners submitted that insufficient funds is not a good reason for the liquidator not to proceed further with the investigation. The petitioners' counsel. Mr David Mathews argued that whilst it is conceded that the liquidator has no general duty to incur expenses where there are insufficient available assets or funds, nevertheless the court can, on application, direct the liquidator to incur an expense on certain terms including an indemnity. See 'McPherson, *The Law of Company Liquidation*, 4th edn, LBC Information Services 1999, at p. 365. As stated by McPherson, it is open to the liquidator to call for indemnities from creditors in relation to costs.

[26] Alternatively, Mr David Mathews contended, the Liquidator could have utilised s. 237(3) of the Companies Act to seek directions from the court to enable him to proceed with the investigations notwithstanding funds but he chose not to do so. See generally the case of *Oriental Finance Bhd v. Syarikat Seri Paroi Sdn Bhd* [2003] 7 CLJ 414.

[27] Mr Eugene Raj for the liquidator clarified that the preliminary report of the liquidator had stated at p. 6 thereof that monies were transferred to an alter-ego of the respondent. The liquidator did not at any time say that it was illegal. At p. 5 of the said report the liquidator had stated that further inquiry should be carried out. However the lack of funds was a key factor is not proceeding at that stage especially when the directors of the respondent will mostly likely put up a commendable challenge to such a legal action as they have in the recovery of the 18 titles action. A liquidator is not bound to pursue a claim on behalf of a company unless he believes that it has a reasonable prospect of success. See: *In Re George A Bond and Company Ltd* [1932] SR (NSW) 301.

[28] I am conscious of the restrain on the otherwise robust and resolute actions intended by the liquidator for lack of funds. The Liquidator is entitled to prioritise his focus and at this stage everything seems to hinge on the successful outcome of the Court of Appeal decision against the High Court's decision in favour of the liquidator who had painstakingly took the risk and without

incurring liability on the part of the respondent for the moment. This is not a case where the liquidator has folded his arms and in a forlorn fashion, forsaken all actions as doomed to failure. He had focused on the jugular and persuaded his loyal and lawyer friends to pursue with the legal action to successfully recover 18 titles wrongfully transferred out from the respondent and now to fervently oppose the appeal in the Court of Appeal. If the petitioners appear to be fuming with frustration, it is partly due to the fact that the legal process takes time and that the wheels of justice do grind, be it so severely slowly. The liquidator has his fair share of frustration when he discovered that Shencourt Sdn Bhd was under a restraining order under s. 176(1) of the Companies Act and as such no action can be pursued against Shencourt Sdn Bhd at least until the expiry of the restraining order.

Failure 5: Failure to call for meetings of the Creditors and/or Contributories

[29] The petitioners contended that pursuant to s. 252 and s. 237(2) of the Companies Act the liquidator is empowered by the court to hold and conduct meetings to ascertain the wishes of creditors and contributories. Indeed in exercising his powers, the liquidator is required to have regard to directions given by creditors and contributories. The petitioners lamented that over seven long years the liquidator has not called for any meetings with creditors and contributories.

[30] The liquidator said that the creditors are well aware of the progress of the litigation that has borne fruits in the High Court and which matter is now before the Court of Appeal. One must differentiate between powers and obligations. The powers to convene a meeting does not mean that such a power must of necessity be exercised unless there is a need to do so. The Liquidator's stand is that very simply there is no need to at this stage as there is nothing that has changed with respect to the financial situation of the respondent since the winding up on 19 April 2002.

[31] The liquidator explained that the convening of general meetings costs money that the liquidator does not have. In any event the liquidator was not requested at any time by any creditor

A or contributory of not less than one-tenth in value of the creditors and contributories to convene a general meeting under s. 237(2) of the Companies Act.

[32] The liquidator further submitted that any breach of the B relevant statutory provisions is a ground for the ROC to pursue against the liquidator and the breach if any, is technical in nature.

[33] I find that whilst ideally there should have been more open communication between the liquidator and the various stakeholders, yet here the lack of funds is a serious challenge C leading to less than an ideal situation.

Failure 6: Overall Failures To Do Such Things As Are Necessary For Winding Up The Affairs Of The Respondent And Distributing Its Assets

D **[34]** It cannot be gainsaid that the object of winding up is the collection and distribution of the assets of the company. However the petitioners contended that the liquidator appears interested only in the 18 titles of properties of the respondent and that he had neglected to recover the other assets of the respondent which E he had initially identified through his investigation.

[35] Again the lack of funds they say cannot be an excuse for not proceeding further. The petitioners say that the liquidator has not explored the various alternatives available to him to fund the F litigation. The liquidator they say are guilty of the indictment of not doing all such things as are necessary for winding up the affairs of the company and distributing its assets.

Failure 7: Failure To Act In The Best Interest Of The Company In Unilaterally Revoking An Option Agreement With Jvc Connection Sdn G *Bhd*

[36] The petitioners highlighted the fact that the liquidator had unilaterally revoked an option agreement with JVC Connection and thereby exposing the respondent to potential lawsuits and other H liabilities. The option agreement was entered into between the respondent and JVC Connection Sdn Bhd (JVC) in respect of the respondent's lands (the 18 titles in question). The petitioners alleged that the liquidator terminated the option agreement purportedly on the ground of conflict of interest of the solicitor I whom the liquidator sought a second opinion on the option agreement and the said solicitor turned out to be a director and

shareholder of the JVC. The petitioners further alleged that JVC is disputing the validity of the termination and will not hesitate to sue the respondent. The petitioners further expressed their unhappiness over the fact that JVC has paid some monies and yet creditors and the court would not have a clue as the liquidator had persistently refused to file form 75. The petitioners expressed that their greatest fear might come true which is that there is a real risk that if the sale of the land should go through there will be a similar lack of accounting in respect of the sale proceeds.

[37] The liquidator said that he had doubted the opinion of the said solicitor who had not only put himself in a conflict of interest situation but had also opined that it was acceptable to proceed with the option and the sale and purchase agreement notwithstanding the order for stay of execution obtained in respect of the re-transfer of the land titles to the respondent. Further the option fee paid was incomplete. The option holder had only paid 10% out of the 2% earnest deposit. The evidence at exh. HKH13 in encl. 112 in letter of Putra Gill, solicitors for the liquidator then by their letter of 25 January 2011 to solicitors for JVC that the Liquidator was refunding the sum of RM54,000,00 paid in part as the option fee.

The Test For Removing A Liquidator

[38] The court is given a discretion to remove the liquidator on cause shown. Section 232(1) of the Companies Act 1965 provides:

> A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

[39] In *Re Sir John Moore Gold Mining Co* [1879] 12 LR, Ch D 331, Jessel MR defined the words "on due cause shown" which then formed part of s. 141 of the Companies Act of 1862 as follows:

> I should say that, as a general rule, they point to some unfitness of the person ... it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up ... some unfitness in a wide sense of the term.

[40] Further in *Intercontinental Properties Pty Ltd* [1977] 2 AC LR 488 it was held, *inter alia*, that the court will not normally appoint as liquidator a person who may be placed in a position where his

A interest and duty may conflict and if after appointment a position of conflict emerges the court may in a proper case remove the liquidator.

[41] For a concise summary of the relevant legal principles B applicable to an application to remove a liquidator, one does well to refer to the decision of his Lordship Ramly Ali J in *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360 at pp. 369-371 where his Lordship comprehensively summarised it as follows:

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> For convenience, the court, set out below the relevant legal principles applicable to an application to remove a liquidator -
>
> (a) A liquidator appointed by the court can only be removed by the court "on cause shown". Section 232 of Companies Act 1965.
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> D
>
> (b) The court does not have an unfettered discretion as 'cause must be shown'. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.
>
> E
>
> (c) The normal ground for removal is that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict.
>
> (See: (i) *In re Sir John Moore Gold Mining* [1879] 12 Ch. Div F 325, 331;
>
> (ii) *Advance Housing v. Newcastle Classic Developments* [1994] 12 ACLC 701; and
>
> (iii) *Commonwealth of Australia v. O'Reilly* [1984] 52 ALR G 031.)
>
> (d) As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can be removed. (A*dvanced Housing (supra)*).
>
> H (e) A liquidator may act even though there has been a prior involvement with the company, provided that the involvement is unlikely to impede the liquidator from acting impartially. (*Advanced Housing (supra)*).
>
> (f) In *Advanced Housing (supra)* there was an actual conflict I because the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

(g) It is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards. (*Commonwealth of Australia v. O'Reilley (supra)*). A

(h) A liquidator who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed. (*In re Sir John Moore Gold Mining Company (supra)*). B

(i) It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some interested parties may object. C

(j) In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all creditors. (*In re White Cliffs Dredging Co.* [1893] 11 NZLR 711). D

(k) **A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success**. (*In re George A Bond and Company Ltd.* [1932] SR (NSW) 301). E

(l) **Where there are no assets which can be imperilled by the continuance in office, fair play to the liquidator may be the decisive factor**. (*In re George Bond (supra)*).

(m) **Fair play to the liquidator is not to be left out of sight**. (*Chun Boon Chin v. JM McCormack & Ors* [1978] 1 LNS 33; [1979] 2 MLJ 156 at 158). F

(n) In *Adam Eyton Limited Exparte Charlesworth* [1887] 36 Ch. 299, the applicant for removal of liquidator was required to give an undertaking to pay all costs and expenses of the liquidator on solicitor and client basis. (emphasis added for grounds relevant to present case) G

[42] In the Singapore case of *Chua Boon Chin v. JM MCCormack & Ors* [1978] 1 LNS 33; [1979] 2 MLJ 156 at p. 158 where the liquidator was removed the Court considered the following matters: H

> Now what are the circumstances here. The question for determination by the court is whether under all the circumstances of the present case due cause has been shown for the removal of the liquidator. In attempting to determine this question, firstly it is pertinent to note that we are dealing with a case where one of the liquidators is also a director and has been a director in this I

A company since its inception and the fact that as such he is closely connected with the other directors. Directors of a company stand *vis-a-vis* in a fiduciary position to the company. Their duties being to exercise their powers for the benefit of the company as a whole and not to put themselves in a position in which their duties and their personal interest may conflict. It is an inflexible rule of the court of equity that a person in a fiduciary position is not allowed to put himself in a position where his interest and duty conflict. This rule is based on the consideration that human nature being what it is, there is danger of a person holding a fiduciary position being swayed by interest rather than by duty and thereby prejudicing those whom he was bound to protect ... per Lord Herschell in *Bray v. Ford* [1896] AC 51.

[43] In determining the question whether under all the circumstances of the present case, due cause has been shown for the removal of the liquidator, I am content to be guided by the principles laid down in *Re Adam Eyton Ltd* [1887] 36 Ch D 299, and to the judgment of Cotton LJ at p. 303 where in commenting on the judgment of Jessel MR in the case of *Re Sir John Moore Gold Mining Co supra*, he goes on to say:

E He does not intend to exhaust all the grounds but in my opinion and I believe the rest of the court agree with me, if the court is satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator and of course then to appoint some other person in his place.

[44] In the same case, Bowen LJ at p. 306 said:

G ... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation.

H **[45]** Long Innes J in *Re George A Bond & Co Ltd* [1932] 32 SR (NSW) 301 had this to say:

I In my view neither suspicion alone, nor even a *prima facie* case which might be rebutted, would either justify or require removal unless there were reason for apprehension that the interests of the liquidation would be imperilled by the continuance in office of the suspect, or unless it were shown that such removal would be for the advantage of those interested in the assets of the company.

> It follows that a liquidator can be removed if the cause shown points to some unfitness of the person in the test as laid down by Jessel MR in *Re Sir John Moore Gold Mining Co* and also where the court exercises its discretion if satisfied on the evidence before it that it is against the interest of the liquidation that a particular person should be appointed liquidator.

[46] The following passage from the *New South Wales* case of In *Re George A Bind & Co Ltd (supra)* is insightful as to the test involved in removing a liquidator. At p. 307 Long Innes J observed:

> I think, with great respect, that there is a fallacy underlying that argument, which involves the assumption that it is the duty of a liquidator to prosecute every claim which any person interested in the liquidation *bona fide* believes should be prosecuted on behalf of the company and in the interests of those who are interested in the liquidation. In my opinion a liquidator owes no duty to the company, or to those interested in the liquidation, to prosecute, or to facilitate the prosecution of, any claim, whether against himself or a third party, unless he believes, or has reason to believe, that such a prosecution has a reasonable chance of success or will serve some useful purpose. It may be that when a *prima facie* case is made, such duty then arises and will continue, unless and until the liquidator shows convincing reasons to the contrary ...

[47] Again at p. 311:

> To remove a liquidator, as Mr. Weston contended should be done, on the ground that a substantial body of shareholders *bona fide* entertains a reasonable suspicion, notwithstanding that the Court was of opinion that it was ill-founded, would be to lose sight of that fair play to the liquidator himself, which, Bowes L.J. said, is not to be left out of sight; and **I am inclined to think that fair play to the liquidator may be a decisive factor in a case where there are no assets which could be imperilled by the continuance in office of the liquidator**. (emphasis added)

[48] Applying the above principle to the present case, fair play to the liquidator involves taking into consideration and giving credit where it is due, to his commendable efforts in commencing, continuing and concluding in favour of the respondent, the order of court in transferring the 18 titles back to the respondent. Fair play to the liquidator involves taking into consideration that hitherto all applications have been made at no immediate costs to

A the respondent. Here there is no danger of the assets of the respondent being imperilled; if at all the liquidator should be commended to have proceeded with patient perseverance to the point of getting an order in favour of the respondent for the transfer back of the 18 titles. Even the petitioners' counsel
B admitted that for that the liquidator has done commendably well.

[49] The fact that the liquidator had not applied to the court for indemnity from the creditors and contributories to foot the bill for further legal action, be it examination of the directors of the
C respondent or some forensic investigation into the irregular payments from the respondent to Shencourt Sdn Bhd may be a misjudgement or even a mistake on the part of the liquidator, but that alone is insufficient to justify his removal. It is not such a mistake as to have seriously prejudiced the liquidation. See: *Procam*
D *(Pte) Ltd v. Nangle* [1990] 4 MTC 208 and *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 10 CLJ 7.

[50] Delay in filing the relevant accounts in Form 75 and the statement of affairs as well as compliance with other statutory time
E frames are matters which the liquidator would have to face the music *vis-a-vis* the ROC but they are not in the class of a blatant violation that has prejudiced or paralysed the respondent to the extent of impairment of its assets. Granted the liquidator has been
F tardy and the court will have to put in place a mechanism where this would be a thing of the past, but to remove him at this stage when he is beginning to realise the fruits of his sweat and toil would be going against the grain of decided cases where fair play to the liquidator is a matter to be taken into consideration in
G deciding whether he should be removed from office.

[51] What is clear is that through a lack of communication with the various stakeholders especially the creditors, a wall of suspicion has come in between them. It is always difficult to interpret silence: it could be a guilty silence or an indolent silence that is
H the result of inactivity. Open communication on the other hand helps to dispel suspicion, clarify doubt and engender confidence. Whilst removing the liquidator would be too drastic at this stage, to allow him to continue as before might confirm the petitioners' fears of history repeating itself. I think justice of the case would
I be best served by appointing another liquidator to act together

with the current liquidator. Two they say is better than one and when in doubt they can confer with each other and when one is bent on too risky an action the other might act as a useful restrain. One may keep in check the other and there will invariably be a greater degree of accountability and transparency. I do bear in mind the rhetorical question: Can two walk together unless they are agreed? Here the consolation is that they will be walking in the same direction together towards the realisation of the assets of the respondent and its distribution to the creditors and contributories in accordance with the law.

[52] The petitioners' choice is Anthony Joseph Skelchy of PKF Covenant Sdn Bhd. The Contributory, Shencourt Sdn Bhd being the largest contributory of the respondent had their own preference: it wanted Jeyaraj Asirvatham of MustaphaRaj Sdn Bhd to be the new liquidator and through its counsel Victoria Martin, it supported the removal of the current liquidator. The other creditors whose purchase price judgment sums are much bigger than the petitioners prefer Narendra Kumar of Grand Thornton. The reason given by the other creditors represented here for objecting to Anthony Joseph Skelchy is because the current liquidator had previously being nominated or endorsed by the petitioners and he had turned out to be tardy and troublesome to deal with. Further H H Tay, counsel for the Loos and Ng were concerned that if the current liquidator is removed now, the appeal fixed on 18 May 2011 in the Court of Appeal may be scuttled as a new firm of solicitors will have to be instructed and the inevitable passing of documents and pleadings from one solicitor to another that would invariably involve a passage of time; hence causing further delay to the prosecution of the liquidator's action to recover the 18 titles. Mr Tay's further objection to Anthony Skelchy being appointed is that the petitioners seemed to have unreasonably rejected the proposals made by the current liquidator with respect to moving forward. Both Mr Tay and Miss Mahsita representing the other creditors have strong objection to the proposal of Jeyaraj Asirvatham as liquidator as the current liquidator had implicated the Contributory Shencourt Sdn Bhd in his report. The petitioners likewise are objecting to the proposal of the contributory on the same ground.

[53] I agree that some distance ought to be there between the liquidator and the party nominating him *vis-a-vis* the interests of the other stakeholders not just to engender confidence but to be

seen to be transparent and free from any taint of influence from any parties. By no means is the court suggesting that any of the liquidators proposed would be of succumbed to any undesirable influence or for that matter, any parties would be exercising any undesirable influence on any of the liquidators proposed. Given the antecedents surrounding this case, it is best that the liquidator proposed be seen to be as independent as possible though every liquidator is no doubt assumed to be and accepted as an independent professional with integrity until proven otherwise!

Pronouncement

[54] Having regard to all the above consideration, justice of this case would have been served by appointing an additional liquidator to act together with the current liquidator. The court thus appointed Narenda Kumar of Grand Thornton as the joint liquidator with Ricky Thong Yew Fook from 26 April 2011.

[55] The appointment is subject always to a single liquidator's fees and subject to directions under s. 232(7) of the Companies Act which this court shall give when both liquidators appear before the court on a next mention date fixed.

[56] The court also takes into consideration that this will least impede whatever further instructions might be necessary for the preparation to oppose the appeal being fixed on 18 May 2011 and subsequent further appeals if any.

[57] I also ordered costs of RM8,000 is to be paid by current liquidator personally to the petitioners.

Postscript

[58] This court has fixed 24 May 2011 as the next mention date for the liquidators to brief the court on the progress in the appeal to the Court of Appeal and the challenges they may face in moving forward. The petitioners' solicitors and the supporting creditors' solicitors as well as the contributory's solicitors have been notified of the mention date too. Whilst past relationships between the liquidators and the creditors have been characterised more by mistrust and suspicion, it is hoped that this and subsequent mention dates fixed as parties move along their time-

line would allow the liquidators to touch base with the various stakeholders. As and when they have found enough momentum and established the human dynamics to go on their own steam and having open channels of communication with one another, this court would then recede into the background.

[59] The court's door remains, as always, open to any party who would knock on it, to seek directions on any matter that may arise in the course of liquidation as envisaged in s. 236(1) and 236(3) of the Companies Act. Parties may not always see eye-to-eye on every issue that may arise, but they are encouraged to look in the same direction together.